Joint study on global practices in relation to secret detention in the context of countering terrorism

Executive Summary

The joint study on global practices in relation to secret detention in the context of countering terrorism has been prepared, in the context of their four respective mandates: the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Working Group on Arbitrary Detention (represented by its Vice Chairperson); and the Working Group on Enforced and Involuntary Disappearances (represented by its Chairperson). As the violation of rights associated with secret detention falls within their respective mandates, and in order to avoid duplication of efforts and ensure complementarity, the four mandates decided to jointly undertake the study.

In conducting this study, the Experts worked in an open and transparent manner. They sought inputs from all relevant stakeholders, including by sending a questionnaire to all UN Member States. Several consultations were held with States and the Experts shared their findings with all States concerned before the finalisation of the study. Relevant excerpts of the report were shared with the concerned States on 23 and 24 December 2009.

In addition to UN sources and the responses to the questionnaire from 44 States, primary sources included interviews conducted with those who were held in secret detention, family members of those held captive, and legal representatives of detainees. Flight data was also used to corroborate information. In addition to the analysis of the policy and legal decisions taken by States, the aim of the study was also to illustrate in concrete terms what it means to be secretly detained, how secret detention can facilitate the practice of torture or inhuman and degrading treatment, and how the practice of secret detention has left indelible traces for the victims, including their families.

The joint study initially describes the international legal framework applicable to secret detention. The report explains at the outset the terminology used for the purpose of this study as to what constitutes secret detention in the context of countering terrorism. The legal assessment concludes that secret detention is irreconcilably in violation of international human rights law including during states of emergency and armed conflict. Likewise, it is in violation of international humanitarian law during any form of armed conflict.

Secret detention violates the right to personal liberty and the prohibition of arbitrary arrest or detention. No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods as they are held outside the reach of the law without the possibility to resort to legal procedures, including *habeas corpus*. Secret detainees are typically deprived of their right to a fair trial as State authorities do not intend to charge or try the detainee. Even if the detainees are criminally charged, the secrecy and insecurity caused by a denial of contact to the outside world and the unawareness of the family about their whereabouts and fate violate the

presumption of innocence and are conducive to confessions obtained under torture or other forms of ill-treatment.

Secret detention at the same time amounts to an enforced disappearance. If resorted to in a widespread or systematic manner secret detention might reach the threshold of a crime against humanity.

Every instance of secret detention is by definition *incommunicado* detention. Prolonged *incommunicado* detention may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute such treatment. The suffering caused to family members of a secretly detained, i.e. disappeared person, may also amount to torture or other forms of ill-treatment, and at the same time violates the right to the protection of family life.

It is not only States whose authorities keep the detainee in secret custody that are internationally responsible for violations of international human rights law. The practice of "proxy detention", involving the transfer of a detainee from one State to another outside the realm of any international or national legal procedure (known as "rendition" or "extraordinary rendition"), often in disregard of the principle of *non-refoulement*, also involves the responsibility of the State at whose behest the detention takes place.

The Geneva Conventions, applicable to all armed conflicts, also prohibit secret detention under any circumstances.

The joint study also provides an historical overview of the use of secret detention. Secret detention in the context of counter-terrorism is not a new phenomenon. From the Nazi regime, with its *Nacht und Nebel Erlaß,* the night and fog decree, to the former USSR, with its Gulag system of forced-labour camps, States have often resorted to secret detention to silence opposition.

Striking similarities can be identified between security measures in the 1970s and 1980s in the context of Latin America and in the last century in other regions such as Africa, Asia, Europe, and the Middle East.

The methods used then as now consist *inter alia* of broad emergency laws, the enhanced role of military and special courts, the practice of torture and/or ill-treatment, kidnappings (renditions), enforced disappearances and notably secret detention. The aim is always the same; to have a deterrent effect because detainees would vanish without leaving a trace and no information would be given as to their whereabouts or fate.

The study then addresses the use of secret detention in the context of the so-called "global war on terror" in the post 11 September 2001 period. This chapter describes the progressive and determined elaboration of a comprehensive and coordinated system of secret detention of persons suspected of terrorism, involving not only the United States of America authorities, but also other States in almost all regions of the world.

Following a description of the legal and policy decisions taken by the United States of America authorities this chapter gives an overview of the secret detention facilities held by them. The report then enumerates proxy detention sites and related practices of 'extraordinary rendition'. Various United Nations bodies have heavily criticized the policy of extraordinary rendition in a detailed way in the past, dismissing it as a clear violation of international law. They also expressed concern about the use of diplomatic assurances.

The Experts also address the level of involvement and complicity of a number of countries. For purposes of the study the Experts provide that a State is complicit in the secret detention of a person where it:

a) has asked another State to secretly detain a person;

b) knowingly is taking advantage of the situation of secret detention by sending questions to the State which detains the person or by soliciting or receiving information from persons who are being kept in secret detention;

c) has actively participated in the arrest and/or transfer of a person, when it knew or ought to have known that this person would disappear in a secret detention facility or otherwise be detained outside the legally regulated detention system;

d) holds a person shortly in secret detention before handing them over to another State where that person will be put for a longer period in secret detention.

e) failed to take measures to identify persons or airplanes that were passing through its airports or airspace after information of the CIA programme involving secret detention had already been revealed.

The study then highlights that secret detention in connection with counter-terrorism policies remains a serious problem on a global scale, either through the use of secret detention facilities similar to those described in a section of the study; through declarations of a state of emergency, which allow prolonged secret detention; or through forms of "administrative detention," which also allow prolonged secret detention. The cases and situations referred to, while not exhaustive, serve the purpose of substantiating the existence of secret detention in all regions of the world within the confines of the definition presented earlier.

In their conclusions, the Experts reiterate that international law clearly prohibits secret detention, which violates a number of human rights and humanitarian law norms that may not be derogated from under any circumstances. If secret detention constitutes an enforced disappearance and is widely or systematically practiced, it may even amount to a crime against humanity. However, in spite of these unequivocal norms, the practice of secret detention in the context of countering terrorism is widespread and has been reinvigorated by the so-called global war on terror. The evidence gathered by the Experts clearly shows that many States, referring to concerns relating to national security – often perceived or presented as unprecedented emergencies or threats – resort to secret detention.

Doing so effectively takes detainees outside the legal framework and renders meaningless safeguards contained in international instruments, including importantly *habeas corpus*. The most disturbing consequence of secret detention is, as many of the experts' interlocutors pointed out, the complete arbitrariness of the situation, together

with the uncertainty about the duration of the secret detention– the feeling that there is no way the individual can re-gain control of his/her life.

States of emergency, armed conflicts and the combat against terrorism – often framed in vaguely defined legal provisions – constitute an "enabling environment" for secret detention. As in the past, extraordinary powers are today conferred on authorities, including armed forces, law-enforcement bodies and/or intelligence agencies, under states of emergency or global war paradigms without or with very restricted control mechanisms by parliaments or judicial bodies.

In many contexts, intelligence agencies operate in a legal vacuum with no law, or no publicly available law, governing their actions. Many times, although legislation does not authorize intelligence bodies to detain persons, they do so, sometimes for prolonged periods. In such situations, there are either no oversight and accountability mechanisms at all, or they are severely restricted, with limited powers and hence ineffective.

Secret detention has relied on systems of trans-border (regional or global) cooperation. This means that in many instances foreign security forces freely operate in the territory of other States. It also leads to the mutual exchange of intelligence information between States. A crucial element in international cooperation has been the transfer of alleged terrorists to other countries, where they may face a substantial risk of being subjected to torture and other cruel, inhuman and degrading treatment in contravention of the principle of non-refoulement. Practices such as "hosting" secret detention sites or providing proxy detention were supplemented by numerous other facets of complicity, including authorizing the landing of airplanes for refuelling, short-term deprivation of liberty before handing over the "suspect", the covering up of kidnappings, etc. With very few exceptions, too little has been done to investigate allegations of complicity.

Secret detention as such may constitute torture or ill-treatment for the direct victims as well as their families. But the very purpose of secret detention was to facilitate and, ultimately cover up torture and inhuman and degrading treatment used either to obtain information or to silence people. While in some cases, elaborate rules were put in place authorizing "enhanced" techniques that violate international standards of human rights and humanitarian law, most of the time secret detention was used as a kind of defence shield to avoid any scrutiny and control – and make it impossible to learn about treatment and conditions during detention.

The generalized fear of secret detention and its corollaries such as torture and ill-treatment tend to effectively result in limiting the exercise of a large number of human rights and fundamental freedoms. These include freedom of expression and freedom of association, as they often go hand in hand with intimidation of witnesses, victims and their families.

The Experts are extremely concerned that many victims of secret detention from many countries around the world indicated that they fear reprisals personally or against their families, if they cooperate with the study and/or allow their names to be used. The injustice done by secretly detaining somebody, is prolonged and replicated

all too frequently, once the victims are released, because the concerned State may try to avoid any disclosure about the fact that secret detention is practiced on its territory.

In almost no recent cases have there been any judicial investigations into allegations of secret detention and practically no one has been brought to justice. Although many victims feel that the secret detention has "stolen" years of their lives and left indelible traces, often in terms of loss of their jobs and frequently their health, they almost never received any form of reparation, including rehabilitation or compensation.

This serious human rights violation deserves therefore appropriate action and condemnation. The Experts conclude with concrete recommendations regarding these practices, aimed at curbing the resort to secret detention and the unlawful treatment or punishment of detainees in the context of counter-terrorism:

a) Secret detention should be explicitly prohibited, along with all other forms of unofficial detention. Detention records should be kept (including in times of armed conflict as required by the Geneva Conventions, including the number of detainees, their nationality, and the legal basis on which they are being held, whether as prisoners of war or civilian internees). Internal inspections as well as independent mechanisms should have timely access to all places where persons are deprived of their liberty for monitoring purposes at all times. In times of armed conflict, the location of all detention facilities should be disclosed to the International Committee of the Red Cross.

b) Safeguards for persons deprived of their liberty should be fully respected. No undue restrictions on these safeguards under counter-terrorism or emergency legislation are permissible. In particular, effective *habeas corpus* reviews by independent judicial bodies are central to ensuring respect for the right to personal liberty. Therefore domestic legislative frameworks should not allow for any exceptions from *habeas corpus*, operating independently from the detaining authority and from the place and form of deprivation of liberty. The study has shown that judicial bodies can play a crucial role in protecting people against secret detention. The law should foresee penalties for officials who refuse to disclose relevant information during *habeas corpus* proceedings.

c) All steps necessary to ensure that the immediate families of those detained are informed of their relatives' capture, location, legal status, and condition of health should be taken in a timely manner.

d) Any action by intelligence services should be governed by law, which in turn should be in conformity with international norms. To ensure accountability in intelligence cooperation, truly independent intelligence review and oversight mechanisms should be established and enhanced. Such mechanisms should have access to any information, including sensitive information. They should be mandated to undertake reviews and investigate upon their initiative, and to make public reports.

e) Institutions strictly independent from those which have been alleged of having been involved in secret detention should promptly investigate any allegations of secret detention and "extraordinary rendition". Those individuals who are

found to have participated in secretly detaining persons and any unlawful acts perpetrated during such detention, including their superiors if they ordered, encouraged or consented to secret detentions, should be prosecuted without delay and where found guilty given sentences commensurate with the gravity of the acts perpetrated.

f) The status of all pending investigations into allegations of ill-treatment and torture of detainees and detainee deaths in custody must be made public. No evidence or information that has been obtained by torture or cruel, inhuman and degrading treatment may be used in any proceedings.

g) Transfers or the facilitation of transfers from one State to the custody of authorities of another State must be carried out under judicial supervision and in line with international standards. The principle of non-refoulement of persons to countries where they would be at risk of torture or other inhuman, cruel or degrading treatment must be honoured.

h) Victims of secret detention should be provided with judicial remedies and reparation in accordance with relevant international norms. These international standards recognize the right of victims to adequate, effective and prompt reparation which should be proportionate to the gravity of the violations and the harm suffered. As families of disappeared persons have been recognized as victims under international law, they should also benefit from rehabilitation and compensation.

i) States should ratify and implement the International Covenant on Civil and Political Rights and the Convention against Torture. Given that the Optional Protocol to the Convention against Torture (OPCAT) requires the setting up of monitoring systems covering all situations of deprivation of liberty, adhering to this international instrument adds a layer of protection. States should ratify the OPCAT and create independent national preventive mechanisms that are in compliance with the Paris Principles, and ratify the International Convention for the Protection of All Persons from Enforced Disappearance. Other regional systems may wish to replicate the system put in place by the Inter-American Convention on Forced Disappearance of Persons.

j) Governments have an obligation to protect their citizens abroad and provide consular protection to ensure that foreign States comply with their obligations under international law, including international human rights law.

k) Under international human rights law, states have the obligation to provide witness protection. But doing so is also a precondition for effectively combating secret detention.